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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NO. 425

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HIGHLAND PARK MANUFACTURING COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT AS TO THE CASE

One of the questions involved in this case is whether, under the National Labor Relations Act, as amended (61 Stat. 136; 29 U. S. C. 151 et seq.), the officers of the CIO must file the reports and "non-Communist" affidavits prescribed in Section 9 (f), (g) and (h) of the Act before a Union affiliated with the CIO may validly initiate a proceeding under the Act.

The Respondent agrees with the Petitioner that this is a question important in the administration of the Act. The Respondent further agrees that the ruling of the Court

below on this question in the present case, 184 F 2d 98, like the ruling of the United States Court of Appeals for the Fifth Circuit in the case of *National Labor Relations Board vs. Postex Cotton Mills*, 181 F 2d 919, is squarely in conflict with the ruling, by a divided court, on the same question in the United States Court of Appeals for the District of Columbia Circuit in the case of *West Texas Utilities Company vs. National Labor Relations Board*, 184 F 2d 233. The Respondent insists that the ruling on this question in the Court below and in the Postex case is right and that the ruling to the contrary in the West Texas Utilities Company case is thoroughly erroneous.

Irrespective of the foregoing, however, it is the Respondent's contention that certiorari should not be granted in the present case because there are other matters involved in this case upon which it is clear that the order of enforcement which the Board seeks should be denied. Although it might otherwise be appropriate to grant certiorari herein upon the non-Communist affidavit issue, still there is no occasion thus to review or disturb the decree denying enforcement below in view of the other aspects of this case which permit of no ultimate decree in this case save one denying enforcement. These other matters which dispose of the present case, irrespective of what is the proper ruling on the non-Communist affidavit question, are set forth in the following pages of this brief.

ARGUMENT

APART FROM THE NON-COMMUNIST AFFIDAVIT ISSUE THE BOARD'S ORDER IN THIS CASE SHOULD NOT BE ENFORCED AND THE DECREE BELOW HAVING DENIED ENFORCEMENT, CERTIORARI SHOULD NOT BE GRANTED

A. The Board's Order Should Not Be Enforced Because It Has Never Been Properly Determined Whether the Union Won or Lost the Election Which Was Held Among the Respondent's Employees.

The Board seeks in this case to compel the Respondent to recognize and engage in bargaining with the Textile Workers Union of America, CIO as agent of the employees in the Respondent's Rock Hill, South Carolina Plant. The Respondent has refused to do this upon the ground that it has never been properly ascertained whether the Union won or lost the election which was conducted by the Board for the purpose of determining the desire of the Respondent's employees on this subject.

The controversy which is here involved arose upon the refusal of the Board's Regional Director to count seven of the votes which were cast in the election. These seven ballots were determinative of the election and the central question in the case is whether in refusing to count these ballots the Regional Director acted in any respect unreasonably or arbitrarily.

It is undisputed that the Respondent agreed in advance to abide by the Regional Director's determinations on all questions "relating in any manner to the election." But the Board concedes that this did not mean that the

Respondent would abide, nor be bound to abide by, any unreasonable, arbitrary or capricious determinations nor any determinations arrived at by unreasonable, arbitrary or capricious means. (Board's brief in the Court of Appeals, P. 13, et seq). Despite the agreement for determinations by the Regional Director, still the issue, as the Board itself correctly states (Board's brief in the Court of Appeals, P. 14), is:

> "Whether the investigation was *fairly conducted* with the end in view of eliciting *all* of the pertinent facts and whether the determination was based upon a *fair appraisal* of those facts." (Emphasis supplied).

Adopting this language of the Board's the Respondent earnestly contends that the Regional Director's action in this case was unreasonable and arbitrary in two respects: first, in that his investigation was not "fairly conducted" nor reasonably adapted to "eliciting all of the pertinent facts"; and secondly, in that his determination was not based upon any "fair appraisal" of all of the pertinent facts. Otherwise expressed, it is the Respondent's contention that the Regional Director's action here was unreasonable and arbitrary: first, in respect to the *circumstances of his obtaining* facts and evidence bearing upon the employment status of the individuals in question; and secondly, in respect to the complete and obvious *incorrectness of his "finding"* as to the employment status of these individuals.

1. *The Procedure By Which the Regional Director Arrived At His Conclusion Was Unreasonable and Arbitrary.*

It would seem that upon so crucial an issue as was here at stake, involving as it did the entire outcome of the elec-

tion and the consequent application or non-application of the fundamental provisions of the Act, the Board would have regarded a full and regular hearing, affording opportunity for examination and cross-examination of witnesses and adversary searching of evidence, as the reasonable and proper procedure for determining the vital and disputed facts. It has indeed been recently held that such is the *only* fair, reasonable and proper procedure in a situation of this sort; and that irrespective of advance agreement authorizing the Regional Director to make determination, such is the procedure through which his determination must be arrived at.

National Labor Relations Board vs. Sidran
181 F 2d 671 (C. A. 5)
cf. *Morgan vs. United States*
304 U. S. 1; 82 L. Ed. 1129

and

National Labor Relations Board vs. Indiana and Michigan Electric Company
318 U. S. 9; 87 L. Ed. 579—in which this

Court said:

> "Courts which are required upon a limited review to lend their enforcement powers to the Board's orders are granted some discretion to see that the hearings out of which the conclusive findings emanate do not shut off a party's right to produce evidence or conduct cross-examination material to the issue."

National Labor Relations Board vs. Capitol Greyhound Lines, 140 F. 2d 754 (C. A. 6) and *National Labor Rela-*

tions Board vs. A. J. Tower Co., 329 U. S. 324, 91 L. Ed. 322, relied on by the Board, are inapposite for in both those cases it affirmatively appears that the Board's Regional Director did conduct a hearing such as the Respondent here sought in vain. In *National Labor Relations Board vs. Capitol Greyhound Lines*, for example, it is noted that:

> "Formal hearing by the Regional Director was had on these objections, testimony of witnesses was adduced, documentary evidence received and a transcript of the proceedings preserved."

In the present case, however, it would seem not necessary for the Court to decide whether it agrees with the ruling of the Sidran case requiring a full and formal adversary hearing even where there is no understanding on the part of the Respondent that there is to be such a hearing. For here there is the additional element that the Respondent did reasonably understand that it would be afforded opportunity to make a full presentation of all pertinent facts, and relying upon that understanding, the Respondent failed to make, and did not in any way try to make, such presentation at the time of the conversation or interview with the Board's Field Agent on the morning after the election.

T. W. Church, the Respondent's General Manager, the only witness who testified on this subject and whose testimony is undenied and uncontradicted, says:

(R. 117) "Well, the day after the election, the night of the election I should say, Mr. Joy asked several of us to meet in our office the next morning to discuss

these challenged votes. We went down there and had a short talk with him . . .

"And we left with the understanding that we would be allowed to present evidence and facts to the Labor Board in regard to them (the individuals in question) . . ."

"Q. On that occasion did you request opportunity to present the facts and the evidence or not.

A. Yes, sir."

. . .

(R. 118)

"Q. Did you understand that you were then and there being given such opportunity?

A. Well, I understood we would be given opportunity."

. . .

"Q. State to the best of your recollection what was said in regard to your request to have opportunity to present the facts and the evidence in regard to the eligibility of these seven people.

A. Well, I can't remember the exact words, but I asked that we be given the opportunity to present the complete facts and the complete picture to either the Board or whoever it was necessary."

. . .

"Q. Now, irrespective of what you think, will you state what was the substance of what he communicated to you on whether you would or wouldn't have an opportunity.

A. Well, he said we would have, or words to that effect.

Q. Would have what?

A. Opportunity to present the facts.

Q. All right. Now, did you, on that occasion, at that meeting, present the facts or not.

A. No, sir. We didn't go into any detail at that time.

Q. Has the Company ever been given an opportunity to give facts and evidence in regard to the—in regard to whether or not the seven persons you refer to were or were not employees of the Rock Hill plant.

A. No, sir."

. . .

And on cross-examination:
(R. 123)

"Q. Mr. Church, you said the night of the election Mr. Joy called a meeting for the next morning?

A. He just asked that we meet the next morning. He wanted to ask us some questions about these girls."

. . .

(R. 124)

"Q. But you say you didn't go into any detail at that time.

A. No, sir. It was our understanding that we would later have a chance to put the facts before the Board in Atlanta. That he was up there to run the election."

(R. 126)

"Q. And you say you have never been given an opportunity to present the facts since that time.

A. No, sir."

(R. 126)

"Q. Did you, at any time, from May 2 until May 29, seek to send to the Regional Director any of this evidence you claimed bore on the status of the challenged persons.

A. I don't remember that we did. We didn't hear anything from them. It was our understanding that we would have an opportunity to do this."

(R. 128)

Well, Mr. Blakeney wasn't down there during the election, and when these votes was challenged, nobody knew they would be challenged because they were employees of the Company. Now, when Mr. Joy asked for this meeting the next day, we merely asked Mr. Blakeney to come down to listen to what was going to happen so he could help us to get together the facts and present them to the Board later. I don't remember Mr. Blakeney taking much part in it as a matter of fact. He was more or less listening so he could help us later. We weren't trying to present all the facts. Up to that time, up to the time they had been challenged it had been our position—rather there was no question in our mind, but what everybody on the payroll of April 12 should vote with the exception of the overseers."

TRIAL EXAMINER MARX: And my understanding is that you explained that position to Mr. Joy?

A. Yes, sir."

. . . .

(R. 129)

"Q. Did the questions put to you by the Board's representative cover the whole situation with respect to these girls or not.

A. No, sir.

Q. Did you ask for an opportunity to present the whole situation with respect to these girls being or not being employees?

A. I did."

Thus, the sum and substance of the situation was that when representatives of the Company met after the election with the Board Agent who had conducted the election, they did so without any expectation of presenting, and without any preparation for presenting, the facts and evidence necessary to depict in reasonable completeness the employment status of the persons in question. On the occasion of this conversation or interview with the Board Agent, the Company representatives answered such questions as occurred to him to ask them, in so far as they were then able to do so. They made no effort to develop or even to delineate the total picture bearing upon the matter at issue. And they departed with the understanding that they would be afforded the opportunity to do so before the making of any final decision on the challenged votes. No witness testifies or claims that the truth of the matter was anything other than this.

2. The Conclusion which the Regional Director Arrived At Was Unreasonable and Arbitrary.

Apart from all of the foregoing and irrespective of how the Regional Director arrived at his conclusion, the conclusion he did arrive at is thoroughly arbitrary. His "finding" that the individuals in question were not employees of the Respondent's Rock Hill Plant was an ex parte declaration bearing no reasonable relation to truth and reality.

The evidence which the Respondent would have presented to the Regional Director had it been afforded the opportunity, and the evidence tendered by the Respondent at the hearing in this proceeding and rejected by the Board's Trial Examiner as immaterial, since the Board's Regional Director had made his determination, was as follows (R. 133-142):

In the Spring of 1946 the Respondent's Rock Hill Plant was being changed from a "plain goods" to a "fancy and striped goods" mill. This change in the nature of the product of the Plant necessitated the hiring of additional "draw-in" or "drawing-in" hands, the "drawing-in" operation being one requiring special aptitude and experience, particularly in fancy and striped goods production. The management of the Rock Hill Plant, after diligent inquiry had been unable to locate any drawing-in hands in Rock Hill or the vicinity.

In the Spring of 1946 the Respondent's Charlotte Plant, which manufactured principally fancy and striped goods, was installing automatic drawing-in machinery which was diminishing the need of the Charlotte Plant for drawing-in hands and which had already resulted in a large proportion

of the Charlotte Plant drawing-in hands being on short-time work.

Such being the situation, the Superintendent of the Rock Hill Plant, after discussing the foregoing circumstances with the Superintendent of the Charlotte Plant, about the middle of March, 1946, which incidentally was before there had been any sort of request or claim for recognition or certification on the part of the Union, communicated with four of the drawing-in hands at the Charlotte Plant and asked them if they would be willing to come to work as drawing-in hands at the Rock Hill Plant. All four stated that they would like to do so. Thereupon they quit their employment at the Charlotte Plant and hired as employees at the Rock Hill Plant, the date of their commencing work at the Rock Hill Plant being March 25, 1946. Thereafter four other drawing-in hands at Charlotte, hearing of this and being aware of the circumstances outlined above, on their own initiative communicated with the Superintendent of the Rock Hill Plant, became hired as drawing-in hands at the Rock Hill Plant, quit their jobs at Charlotte and began to work at the Rock Hill Plant on April 1, April 1, April 6 and April 8 respectively. Even after the election, on May 1, the same process continued, two drawing-in hands from the Charlotte Plant, on May 6, similarly communicating with the Superintendent of the Rock Hill Plant, becoming hired and thereupon quitting their jobs at the Charlotte Plant.

These women upon quitting their jobs at the Charlotte Plant severed all connections of every nature with that Plant and retained no relations of any kind with it. They were taken off the payroll of the Charlotte Plant and regular employment severance cards were made out and

filed for all of them. The employee insurance which they had been carrying with the Charlotte Plant was cancelled and terminated and on all reports and records kept by the Charlotte Plant, such as, Federal Social Security and North Carolina State Unemployment Compensation records and reports, their names were dropped and they were reported as no longer employees.

As soon as they became hired and commenced working at the Rock Hill Plant, these women were put on the payroll there, became listed and shown as employees of the Rock Hill Plant on all forms, records and reports, such as Federal Social Security and South Carolina State Unemployment Compensation records and reports for that Plant. Likewise, the Rock Hill Plant began to pay workmen's compensation insurance premiums for these persons as its employees. And, despite the Board's statement to the contrary (Board's brief in Court of Appeals, P. 6) these individuals were offered the opportunity of participating in the life, hospital and medical insurance plan at the Rock Hill Plant along with all other employees there and on exactly the same terms as any other newly hired employee, and they accepted and applied for such insurance at the Rock Hill Plant.

The individuals in question have participated in all wage increases and other benefits, along with all other employees of the Rock Hill Plant, since they commenced working there. They engage in social activities and have all other normal interests in common with the other employees of the Rock Hill Plant. They receive all notices and other communications which the Rock Hill Plant sends to its employees generally.

Since these ten women commenced to work at the Rock Hill Plant in the Spring of 1946, they have worked there regularly ever since, except that one of them quit on August 2, 1946, and another quit on September 15, 1946. Each of these two who quit then applied to be hired as drawing-in hands at the Charlotte Plant but were refused because of the diminished need for drawing-in hands there, as hereinabove mentioned. And neither of these two has ever worked at the Respondent's Charlotte Plant since she quit work at the Rock Hill Plant.

These individuals have seen fit to keep their homes in Charlotte and ride to Rock Hill each working day, but their homes in Charlotte are their own and are not property that the Respondent, or its Charlotte Plant, have any connection with whatever. Likewise various other employees of the Rock Hill Plant have homes away from Rock Hill and travel to their work in the Rock Hill Plant distances as great as that from Charlotte to Rock Hill.

The individuals in question are the only employees at the Rock Hill Plant who can perform the drawing-in work on the fancy and striped goods there and for this reason the Rock Hill Plant pays them more than its other drawing-in hands, of whom there are only two, including pay for the time spent in travelling to and from their homes in Charlotte. The Company was willing, and is willing, to pay these ten women, now eight, on this higher basis because such were the rates they demanded upon becoming hired at the Rock Hill Plant and such were the rates that the Rock Hill Plant decided to pay them in order to procure their very necessary services.

That the matters above set forth were the true facts and circumstances bearing upon the employment status of

the persons in question is not contradicted or denied by any witness. The Board takes the position, however, that it makes no difference whether these were facts or not. For, says the Board, the Regional Director's conclusion is final *"unless arbitrary."* But the point is that if these be the facts, then the Regional Director's conclusion *is arbitrary* on its face—apart from the matter, earlier herein discussed, of arbitrariness in his method of arriving at such conclusion.

Under the "consent election" agreement, the only issue before the Regional Director was whether the individuals in question were "employees at the Company's Rock Hill, South Carolina Plant who appear on the Company's payroll for the period ending April 12, 1946" (R. 96). It was undisputed that the names of these persons did appear on the payroll of the Rock Hill Plant for the period ending April 12, 1946.

The Regional Director's ruling thus became reduced to the one proposition that these individuals were not "employees" at the Rock Hill Plant. He could not very well deny that they were employed and that they were "employees" somewhere. Hence his ruling, despite all the facts above set forth, was that these persons were not employees at the Rock Hill Plant but were employees at the Charlotte Plant!

Taking the facts to be as set forth above, and since no witness contradicts or denies them, they must be so taken, the Regional Director's pronouncement that the persons in question were employees at the Charlotte Plant and were not employees at the Rock Hill Plant was arbitrary, and nothing short of arbitrary—and no more entitled to binding effect than if he were to "find" that a cow is a

horse. He could just as readily declare that he had decided that weavers or spinners at the Rock Hill Plant were not "employees" there and hence not entitled to vote.

It is respectfully submitted that the agents of the Board have no power thus arbitrarily to "determine" the outcome of employee elections and that they acquire no such power from an agreement for a "consent election."

B. ALLEGED MEMBERSHIP CARDS AND A PETITION OBTAINED BY THE UNION AFTER THE ELECTION CANNOT ALTER THE RESULT

The Board contends that irrespective of whether the persons in question were employees at the Rock Hill Plant and irrespective of whether a majority of the employees voted for the Union or against the Union, the Respondent was nevertheless legally bound to recognize the Union because of designation cards which the Union told the Company in September, 1946, it had obtained and because of an employee petition mailed to the Company by the Union on April 12, 1947.

As to this it is first to be noted that the general rule is that an employer is not required to recognize a Union upon its presenting what purports to be an employee petition or upon its offering to allow some third party to check "designation" cards. The rule is rather that the employer is entitled to insist on the more accurate and dependable method of ascertaining the free wishes of his employees by a secret ballot election.

In the matter of Roanoke Public Warehouse.
72 N.L.R.B. 1281.
19 L.R.R.M. 1267.

Here the Respondent had no reliable means of knowing whether all, or how many, of the signatures on the cards and the petition were genuine and, even more importantly, it had no means of knowing to what extent misrepresentation or undue influence and coercion may have been a factor in the obtaining of the signatures. The Respondent informed the Union that it had these misgivings in regard to the cards and the petition (R. 120-122).

As to the first of these considerations, the Board blithely declares that the Company could not have had any bona fide doubts or, if it had, they could readily have been resolved. The further consideration, that is, the possibility of misrepresentation, pressure and coercion in the obtaining of signatures, the Board does not even advert to.

The Respondent was, of course, not free to undertake any direct investigation among its employees on either of these matters. Enough miscellaneous information did come to its attention, however, to illustrate the reasonableness, in this instance, of the general rule that the employer is not legally required to accept such cards and petitions at their face value. One employee stated (R. 106-107) that she signed a Union card not because she wanted the Union to represent her but solely in order that she might "run (her) job in peace." Another testified (R. 107) that when he signed the Union card he did not know he was joining the Union but thought he was signing "not to strike." Another stated (R. 108-111) that the "only reason" he signed a Union card was to stop

nails being thrown in his driveway. One employee testified (R. 107) that he did not sign a Union card at the time the card purported to show he signed. And another declared (R. 112) that he did not sign in the presence of a witness whom the card purports to show as a witness.

Two employees testified (R. 104) that they did not sign the petition in the presence of the notary public, whose certificate on the petition stated that all persons signed had done so in his presence. Further, in this connection, it is to be noted (R. 102-104) that of numerous notaries public readily available in the community the Union selected one who was on two of its committees, gave him a list of names with instructions to go around and "see" everybody on the list; that "about half" of the persons who signed did so at the Union commissary; that this notary public "had to chase the others down," until the Union told him he had "got enough of them anyway."

And the general dependability of the petition was, of course, further to be discounted in view of the fact that it was gotten up in the midst of a strike and among all the circumstances of pressure and tension usually attendant upon such resort to "economic strength."

Finally, as to the Respondent's legal duty to recognize the Union upon the cards and the petition it is to be noted that the Board usually insists that an election settles the question of duty to bargain or not to bargain for a reasonable length of time and that upon a majority of an employer's employees voting for a Union, he must recognize and bargain with that Union for a substantial length of time despite any showing of change in the employees' wishes during that time. cf. *National Labor Relations Board vs. Highland Park Manufacturing Company*, 110

F. 2d 632 (C. A. 4); *Great Southern Trucking Company vs. National Labor Relations Board,* 139 F. 2d 984 (C. A. 4).

Is not the converse then equally true, that if a majority of the Respondent's employees voted against the Union on May 1, 1946, then no other or different showing, by cards, petitions or the like, could quickly alter the Union's non-majority status as established by the election. The Respondent was entitled to insist upon whatever might be the status established upon a proper count of the election ballots. And the Respondent made it clear that it would, as would be its duty, conform to and abide by the outcome of such election count. As to this T. W. Church testified (R. 117):

> "We told them this:—We told both the Union representative and the Board representative that if they would count those votes, that we would abide by the decision and if it was in favor of the Union, we would bargain. And we were led to believe that they would be counted."

C. MOREOVER, THE BOARD'S DELAY IN THIS CASE HAS BEEN SUCH THAT ENFORCEMENT OF ITS ORDER SHOULD BE DENIED

It is now almost five years since the election among the Respondent's employees was held. The Union initiated this proceeding by filing its charge against the Respondent on September 13, 1946. From then on the way was open for the Board to issue a complaint and expeditiously bring this matter to a head. But for almost two and one-half years, and until January 10, 1949, it delayed in even

issuing a complaint. In any reasonable view it would have seemed that the case "was dead" (R. 122).

Meantime, and until the Board moved against the Respondent, there was no means available to the Respondent to obtain adjudication of the question at issue. cf. *National Labor Relations Board vs. Norfolk Ship Building & Drydock Corporation*, 172 F. 2d 813 (C. A. 4).

The Respondent respectfully suggests that the Court will not be inclined to affirm by its decree the agency authority of a Union where there is not only serious controversy as to whether it ever was agent but where there has also been so much unnecessary delay on the part of those who belatedly seek the Court's decree.

The situation is not one in which the Respondent seeks to show to the Court that its employees no longer desire to be represented by the Union. cf. *National Labor Relations Board vs. Highland Park Manufacturing Company, supra and Great Southern Trucking Company vs. National Labor Relations Board, supra*. The question here, in the first instance, is whether the employees ever did desire to be represented by the Union. And the Respondent is further simply pointing out that any registration of sentiment almost five years ago, whether for the Union or against the Union, is now so old and stale as to constitute no basis of an order "appropriate for present enforcement." *National Labor Relations Board vs. Norfolk Ship Building & Drydock Corporation, supra*. As is said by the Court in *National Labor Relations Board vs. Eanet*, 179 F. 2d 15 (C. A. D. C.):

> "Entry of decree unrelated to present reality is not countenanced by our jurisprudence. In an ordi-

nary lawsuit of the magnitude of the case at Bar, we venture to say that no Court would enter a mandatory or injunctive decree on data two years old."

Upon all of the foregoing it is submitted that enforcement of the Board's order should not be granted in this case; and such enforcement having been denied below, that denial should not now be disturbed by the issuance of a writ of certiorari.

Respectfully submitted,

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Counsel for the Respondent